IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-734

ELIZABETH A. SMITH, et al.,

Petitioner,

v.

ROBERT TROYAN, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order vacating its denial of the Petition For A Writ Of Certiorari entered on June 14, 1976, and granting the petition. This petition for a rehearing is founded upon the recent decision of this Court in Washington v. Davis, ___ U. S. ___, 44 L.W. 4789 (No. 74-1492) (June 7, 1976).

The instant case presents the question, inter alia, whether the enforcement of an ordinance which requires applicants for the position of municipal police officer to meet a minimum height requirement is sexually discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment. 1/ Washington v. Davis now makes clear that, in the context of such a challenge, proof of discriminatory purpose is necessary in order to make out an equal protection violation. Washington v. Davis, ___ U. S. ___, 44 L.W. at 4794. This purpose to discriminate may be proven in a variety of ways: by demonstrating the intentional systematic exclusion of members of a protected class, or by showing an unequal application of

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1/ In her Petition For A Writ Of Certiorari, filed November 18, 1975, Petitioner presented three separate questions for review: two relating to her allegation of sex discrimination and one relating to her allegation of race discrimination. Petitioner does not now seek review of that portion of the decision of the United States Court of Appeals for the Sixth Circuit relating to the alleged racially discriminatory nature of the written entrance examination administered by the Respondents. However, because the sex discrimination aspect of this case has a factually different foundation than the race discrimination claim, Petitioner seeks this rehearing.

the law. 44 L.W. at 4792. "Frequently the most probative evidence of intent will be ; objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." 44 L.W. at 4800. (Stevens, J. concurring). Although disproportionate impact is not irrelevant, a law is not unconstitutional solely because it has such an impact. Occasionally the disproportion may be so dramatic that it cannot be explained on non-discriminatory grounds. However, the general rule, absent exceptional circumstances, is that disproportionate impact standing alone is not sufficient to make out a case of unconstitutionality. 44 L.W. at 4792-4793.

Because Petitioner believes that the United States Court of Appeals for the Sixth Circuit utilized a standard contrary to that mandated by Washington v. Davis in judging the constitutionality of the challenged height requirement, Petitioner now seeks full review of that decision. Alternatively, Petitioner seeks an order vacating the decision of the Court of Appeals and remanding this case to the District Court for reconsideration in light of Washington v. Davis. 2/ Cf. Place v.

2/ In its present stance this case faces further proceedings in the District Court. The District Court, after trial, found three separate violations of the law: (1) The unconstitutionality of the height and weight requirements; (2) The unconstitutionality of the written test; and (3) The unlawful application of the Ohio veteran's

Weinberger, ____ U.S. ____, 44 L.W. 3718 (No. 74-116) (June 14, 1976).

In its Order of September 6, 1973, 3/ the District Court held that Defendants' enforcement of the minimum height and weight requirements for police officer applicants unlawfully discriminated against the Petitioner and her class because of their sex. The Court concluded that the requirements "were maintained and enforced by the defendants as a part of a process to hire only males as police officers with the effect and intent

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(Footnote 2 continued)

preference statute. (A-56-57). However, before any comprehensive plan for relief could be fashioned by the court, the Respondents appealed as to some of these findings. The Respondents succeeded in reversing only two of the court's conclusions. The District Court's determinations as to the application of the veteran's preference and the unconstitutionality of the weight requirement remain undisturbed. Consequently, the District Court now must fashion appropriate relief to effectuate both its earlier decision and that of the court of appeals.

3/ The District Court Order appears in the Appendix to the Petition For A Writ Of Certiorari at pages A-1 through A-58. The decision of the Court of Appeals appears at pages A-59 through A-70 of this same Appendix.

to exclude nearly all women." (A-31) (emphasis added). The Court reached this conclusion only after having found numerous independent instances of sexually discriminatory intent. During the entire history of the Police Department, no women had been certified for hiring or hired as police officers. (A-11). During the 1950's, when the height and weight requirements were adopted, there were no positions available for women. (A-10). The requirements represented a figure which was considered reasonable for male applicants and, had the Defendants been seeking women, they would have modified the height and weight requirements accordingly. (A-10-11). After examining the statistical effect of the height and weight requirements, the Court found that together they excluded ninety-nine percent (99%) of the adult female population from employment as police officers, while permitting a majority of the adult male population to remain eligible for such employment. (A-9-10). When Petitioner initially inquired about the position of police officer, she was discouraged from applying and told that the Defendants were not seeking women. (A-11). However, at the same time that Petitioner was being turned away because of her failure to meet the height requirement, two males who also failed to meet the requirement were permitted to take the examination. (A-11).

These findings, when viewed together with the past and present policy of the Defendants toward the hiring of women, compelled the Court to conclude that the height and weight re-

quirements were enforced and maintained as a contrivance to guarantee an all male work force. (A-31). Cf. Wright v. Rockefeller, 376 U.S. 52 (1964); Yick Wo v. Hopkins, 118 U. S. 356 (1886).

When the Court of Appeals for the Sixth Circuit reviewed the District Court's opinion, it failed to consider these specific findings of intent which supported the trial court's opinion. [4/] Purporting to draw guidance from this Court's opinion in Geduldig v. Aiello, 417 U. S. 484 (1974), the appellate court concluded that based solely upon the evidence of disparate impact, the height requirement did not create a gender-related classification.

However, at no time did the Court discuss whether the specific findings of intentional discrimination were sufficient to establish the pretext referred to in footnote 20 of Geduldig v. Aiello, 417 U. S. at 496-497. Lacking the benefit

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4/ Although the Court of Appeals never concluded that any of the District Court's findings of fact were clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure, it did appear to ignore certain of them and confuse others. Compare A-63, n. 5, with the District Court's finding that two men were permitted to take the test in spite of the fact that they failed to meet the height requirement. (A-11).

of this Court's decision in Washington v. Davis, supra, the Court of Appeals never analyzed Petitioner's evidence in light of this recent pronouncement. 5/ Petitioner submits that the Court of Appeals erred in applying the test of equal protection by failing to consider the effect that the District Court's specific findings of intent have on its consideration of the Petitioner's claim.

CONCLUSION

For the above reasons, as well as those contained in the Petition for a Writ of Certiorari, Petitioner prays that this Court direct the Respondents to reply to this Petition for Rehearing, and that the Court thereafter grant

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5/ Petitioner has been informed that on June 28, 1976, a three-judge panel of the Middle District of Alabama declared, in a per curiam opinion, that the Alabama statutory height and weight requirements for employment as a state trooper were sexually discriminatory and in contravention of the Fourteenth Amendment. After applying the Washington v. Davis standard to the facts before it, the court reached a conclusion contrary to that of the Sixth Circuit. Mieth v. Dothard, Civil Action No. 75-433-N (M.D. Alabama, June 28, 1976).

rehearing of the Order of denial, vacate that Order, grant the Petition, and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As Counsel for Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Charles E. Guerrin
Counsel for Petitioner

CERTIFICATE OF SERVICE

Three copies of the Petition for Rehearing have been mailed this 6th day of July, 1976, to Charles T. Riehl, Esq., 1215 Terminal Tower, Cleveland, Ohio 44113, and Henry B. Fischer, Esq., Williamson Building, Cleveland, Ohio 44114, Attorneys for Defendants-Respondents.

Charles E. Guerrin
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